82-459

No. ———

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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WALTER PARCINSKI,
*Petitioner,*

v.

THE OUTLET COMPANY, INC., and
THE EDWARD MALLEY COMPANY,
*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## QUESTIONS PRESENTED

1. Whether a plaintiff who alleges that he was denied a job because of his age, in violation of the Age Discrimination in Employment Act of 1967, establishes a prima facie case of age discrimination, sufficient to entitle him to submission to the jury, by introducing evidence *inter alia* that (1) he is within the age group (40-70) protected by the ADEA; (2) he applied for a vacant job for which he was qualified; (3) he was rejected; and (4) the job was awarded to a younger employee who was less qualified.

2. Whether, when a plaintiff in an ADEA case has introduced evidence establishing a prima facie case, and the employer introduces testimony that legitimate reasons motivated the decision, a plaintiff who fails to specifically rebut the employer's proffered reasons is nonetheless entitled to have the case submitted to the jury so that the jury may determine the credibility of the witnesses proffering the employer's reasons, and, if it disbelieves them and credits the plaintiff's evidence, return a verdict for the plaintiff on the basis of the inferences flowing from the evidence establishing the plaintiff's prima facie case.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| STATUTE INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THE WRIT | 9 |
| CONCLUSION | 16 |

APPENDICES

| | |
|---|---|
| A—Opinion of Court of Appeals | App. 1a |
| B—Judgment of District Court | App. 7a |
| C—Order of District Court Denying Motion for Judgment N.O.V. | App. 8a |
| D—Order Extending Time To File Petition for Certiorari | App. 9a |
| E—Order Further Extending Time To File Petition for Certiorari | App. 10a |

## TABLE OF CITATIONS

*Cases:* Page

Aikens v. United States Postal Service, 665 F.2d 1057 (D.C. Cir. 1981) ..... 11, 12-13
Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 ..... 10
Brown v. Eckerd Drugs, Inc., 663 F.2d 1268 (4th Cir. 1981) ..... 16
Franks v. Bowman Transp. Co., 424 U.S. 747 ..... 10
Furnco Construction Co. v. Waters, 438 U.S. 567 ..... 10
Geller v. Markham, 635 F.2d 1027 (2nd Cir. 1980), cert. denied, 451 U.S. 945 ..... 10, 13
Johnson v. Lehman, 679 F.2d 918 (D.C. Cir. 1982) ..... 10
Kephart v. Institute of Gas Technology, 630 F.2d 1217 (7th Cir. 1980), cert. denied, 450 U.S. 959 ..... 10
Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975) ..... 10
Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979) ..... 10
Lorillard v. Pons, 434 U.S. 575 ..... 10
McDonnell Douglas Corp. v. Green, 411 U.S. 792 ..... 10, 12
Pullman-Standard v. Swint, —— U.S. ——, 102 S.Ct. 1781 ..... 12, 14-15
Reeves v. General Foods Corp., 682 F.2d 515 (5th Cir. 1982) ..... 11, 14
Schwager v. Sun Oil Co., 591 F.2d 58 (10th Cir. 1979) ..... 10
Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980) ..... 10
Smithers v. Bailer, 629 F.2d 892 (3rd Cir. 1980) ..... 10
Spagnuolo v. Whirpool Corp., 641 F.2d 1109 (4th Cir. 1981) ..... 11, 16
Ste. Marie v. Eastern R. Ass'n, 650 F.2d 395 (2nd Cir. 1981) ..... 11, 13, 16
Sutton v. Atlantic Richfield Co., 646 F.2d 407 9th Cir. 1981) ..... 10
Teamsters v. United States, 431 U.S. 324 ..... 10
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 ..... 10, 13

TABLE OF CITATIONS—Continued

Page

Tribble v. Westinghouse Elec. Corp., 669 F.2d 1193 (8th Cir. 1982), pet. for cert. pending, No. 81-2202 ..... 10, 11, 16
United Air Lines, Inc. v. McMann, 434 U.S. 192 .. 6
United States Postal Service v. Aikens, No. 81-1044, cert. gr. 3/22/81 ..... 11, 12-13
Williams v. General Motors Corp., 656 F.2d 120 (5th Cir. 1981), cert. denied, 102 S.Ct. 1429 ..... 10

*Statutes:*

Age Discrimination in Employment Act of 1967:
Sec. 4(a)(1), 29 U.S.C. § 623(a)(1) ..... *passim*
Sec. 4(f)(2), 29 U.S.C. § 623(f)(2) ..... 5
Sec. 7(b), 29 U.S.C. § 626(b) ..... 7
Sec. 12(a), 29 U.S.C. § 631(a) ..... *passim*
Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e et seq. ..... *passim*

*Miscellaneous:*

29 C.F.R. § 860.120(a) ..... 6
29 C.F.R. § 1625.7 ..... 6
Brief for Petitioner in *United States Postal Service* v. *Aikens*, No. 81-1044 ..... 13
Note, The Cost of Growing Old: Business Necessity and the Age Discrimination in Employment Act, 88 Yale L.J. 565 (1979) ..... 6
Petition for Certiorari in *Westinghouse Elec. Corp.* v. *Tribble*, No. 81-2202 ..... 16

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Walter Parcinski, Petitioner, respectfully petitions this Court to grant a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on February 22, 1982.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, reported at 673 F.2d 34, is reprinted in the Appendix as Appendix A. The judgment of the United States District Court for the District of Connecticut, entered following the jury verdict, is unreported, and is reprinted as Appendix B. The order of the District Court denying Respondents' Motion for Judgment N.O.V. is unreported, and is reprinted as Appendix C.

## JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on February 22, 1982. A timely Petition For Rehearing and Suggestion For Rehearing Banc was denied on April 19, 1982. On July 9, 1982, Justice Powell signed an order extending the time for filing a petition for a writ of certiorari to and including August 17, 1982 (Appendix D). On August 12, 1982, Justice Marshall signed an order further extending the time for filing a petition for a writ of certiorari to and including September 16, 1982 (Appendix E). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

The pertinent provisions of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et. seq.*, are as follows:

Section 4(a)(1), 29 U.S.C. § 623(a)(1):

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

Section 12(a), 29 U.S.C. § 631(a):

> The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

## STATEMENT OF THE CASE

In this action under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, the jury returned a verdict for the plaintiff (Petitioner), but the Court of Appeals overturned that verdict and directed that the complaint be dismissed. In this posture, the evidence must be viewed in the light most favorable to Petitioner, and our statement proceeds accordingly.

In June 1977, Respondent Edward Malley Company, which owned and operated a department store in New Haven, Connecticut, was purchased by Respondent Outlet Company, a firm based in Providence, Rhode Island that already owned and operated seven department stores. At the time of the purchase, Petitioner was 63 years old, and had been a buyer with Malley for 32 years, many of them as the buyer for the housewares department.

Upon acquiring Malley, Outlet restructured certain jobs at the Malley store with the goal of reducing employment costs. As Outlet had a centralized corps of buyers in Providence—who purchased for all of Outlet's stores—Outlet decided to eliminate all buyer and assistant buyer positions at Malley, thereby abolishing Petitioner's job. However, as the buyers at Malley had, in addition to their purchasing duties, supervised other store employees in their respective departments, Outlet decided to create a smaller number of "department manager" positions at the Malley store to carry on that supervisory function. Outlet decided to staff the new department manager positions with some of the Malley employees whose jobs were being abolished, and to discharge the remainder of the Malley buyers and assistant buyers.

Prior to deciding which employees to keep as department managers, a Vice President of Outlet met with Alfred Seigle, the merchandise manager of Malley (who had supervised many of the buyers and assistant buyers), to secure Seigle's assessment of the "relative merits" of the Malley buyers. Seigle identified five individuals, including Petitioner, as the "strongest buyers" at Malley, and recommended that those five be kept on in some capacity. Despite this recommendation, Outlet's officials decided to give the position of manager of the housewares department to another employee who was in his late 30's or early 40's and had been the buyer in another department. The latter had not been among the five identified by Seigle as the "strongest buyers", and had no prior

experience in the housewares department. Seigle testified that there was "no comparison" between Petitioner and the employee selected in terms of qualification for the new position of manager of the housewares department—Petitioner was the better qualified in every respect: supervisory ability, administrative ability, and knowledge of the merchandise sold in that department.

Respondents offered no evidence—nor did they claim—that the employee selected was better qualified than, or even as qualified as, Petitioner for the position. At the time Outlet's officials made their choice, Outlet's President, Levon Charleson (who prior to 1970 had been a Malley official for fifteen years and thus had come to know Petitioner's work well), knew that Petitioner was a "very good" employee. Outlet's officials also knew, at the time they made the choice, that Petitioner was 63 years old, and that under the existing pension plan he would become eligible to retire with a pension if, but only if, his employment continued until age 65.

On June 24, 1977, Charleson told Petitioner that his employment was being terminated effective that day. Petitioner expressed shock; termination meant that he would not qualify for a pension despite 32 years' service.[1] He asked whether there was some other job to which he might be assigned. Charleson responded that there was not, and that Petitioner "could use his severance pay in lieu of the pension." Charleson told Petitioner that it was "just too expensive to carry" Petitioner in a department manager position. Charleson promised, however, that if a buyer position opened up in Providence for which Petitioner was qualified, he would be given preference in fill-

[1] Petitioner testified that he had intended to retire in 1980, three years after Outlet's acquisition of Malley. He further testified—and the former President of Malley confirmed—that in 1973 Petitioner had received a job offer from a rival department store at a higher salary, but had been dissuaded from accepting it when the Malley President pointed out that Petitioner's higher salary would not equal in value the pension he would obtain by remaining with Malley.

ing that position. (All of the Malley buyers who were terminated on that date were given a similar assurance.)

The decision by Outlet management not to retain Petitioner was paralleled in the filling of the other department manager positions. In general, the department manager positions were offered to the assistant buyers and the younger buyers, while the older, more senior buyers were terminated.

In December 1978, Outlet's housewares buyer in Providence was forced to retire because of illness. Despite Outlet's prior promise to Petitioner of preferred consideration, and despite Outlet's knowledge—admitted at trial—that Petitioner was a "very good" buyer of housewares who had experience virtually identical to that of the incumbent who was retiring, Petitioner was not offered the position. Instead, the position was awarded to a buyer working for another company, who was much younger than Petitioner. Outlet offered no evidence—nor did it claim—that the person selected was better qualified, or even as qualified, as Petitioner. The selectee held the buyer's job for only a few months, after which it again became vacant. Once again, the position was not offered to Petitioner. (In contrast to the treatment accorded Petitioner, two former Malley buyers in their 30's *were* offered buyer positions in Providence when vacancies arose there).

Petitioner then brought the instant action, alleging that Outlet had bypassed him because of his age (in particular, to avoid the cost of the pension for which Petitioner would have become eligible had he worked another two years and attained age 65 while still in Respondents' employ),[2] both in selecting a younger and less qualified person for the department manager position in 1977, and

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[2] Section 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2), makes explicit that the higher pension cost associated with employment

in selecting younger and less qualified persons to fill the housewares buyer position in Providence when it became vacant in 1978 and 1979.

At the trial, which was to a jury, the evidence recited above was introduced. In rebuttal, officials of Outlet testified as to their reasons for not selecting Petitioner for these positions. Outlet's President Charleson, when asked by Respondents' counsel whether age had been "a determining factor in your decision," responded initially: "Not truly." None of Outlet's witnesses claimed that the persons actually selected were as qualified or better qualified than Petitioner. Rather, they furnished the following explanations for their decisions:

(1) Petitioner was not hired for the newly created department manager position at the Malley store because department managers were to receive a much lower salary than Petitioner had been receiving as a buyer, and Outlet's officials believed that there might be morale problems if employees were retained at substantially reduced salaries; accordingly, the positions were awarded to employees whose prior salaries had been commensurate with that of the new job.

(2) The decision to select others for the buyer position in Providence reflected a decision, made coincident with the retirement of the incumbent buyer, to change the type of housewares marketed by Outlet from "basic" to

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of an older worker is not a permissible basis for rejecting that worker:

> [N]o [bona fide] employee benefit plan shall excuse the failure to hire any individual . . . .

As this Court explained in *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 202, Congress intended "that the existence of such plans could not be used as an excuse not to hire any person because of age." See also, 29 C.F.R. §§ 860.120(a), 1625.7; Note, *The Cost of Growing Old: Business Necessity and the Age Discrimination in Employment Act*, 88 Yale L.J. 565, 585 n. 90 (1979).

"gourmet." Petitioner was fully qualified to buy the type of merchandise previously marketed, but Petitioner had no experience purchasing housewares of the different type now contemplated. On cross-examination, however, Outlet's President admitted that the younger person actually selected for the buyer position had, in his prior buyer position with another company, been purchasing the same type of housewares as Petitioner.

The district court submitted the case to the jury, instructing that plaintiff had the burden of proving by a preponderance of the evidence that one or more of the decisions about which he complained had been motivated by age. The jury returned a verdict in Petitioner's favor of $93,500. By special interrogatory, the jury found that the age discrimination was willful; the district court therefore awarded an additional equal sum as liquidated damages pursuant to 29 U.S.C. § 626(b).

Respondents filed a motion for judgment n.o.v, contending that Respondents had introduced evidence that they had been motivated by factors other than age and Petitioner had not thereafter introduced any evidence that specifically demonstrated those explanations to have been pretexts. Respondents' counsel argued, in support of the motion:

> In order for us to be found guilty of age discrimination, for that [evidence] to be considered pretextual there should be some evidence put on by plaintiff to rebut our presentation of the reasonableness [of the decisions.]
>
> • • • •
>
> That evidence which we put on to defend the claim was not rebutted in this lawsuit, and therefore our defense to the claim is not pretextual.

The district court, from the bench, disagreed:

> Suppose the jury didn't believe your evidence . . .
>
> • • • •

> The jury has, and they are charged constantly, to make a decision as to whether they're going to believe all or part of any witness' testimony. Now I don't believe, and I don't know of any authority that says it, if that testimony isn't contradicted by other testimony they can't reach the issue of credibility.
>
> * * * *
>
> [C]redibility is peculiarly a matter for the jury to determine.[3]

The court subsequently entered an order denying the motion for judgment n.o.v. "for the reasons stated in open court" (App. 8a), and entered judgment for plaintiff (App. 7a).

Respondents appealed, contending that the district court erred in failing to grant their motion for judgment n.o.v. for two reasons: (1) Petitioner's evidence did not establish a prima facie case of age discrimination; and (2) even if it did, Respondents' witnesses' testimony that they were motivated by legitimate reasons was "uncontradicted" and thus those reasons could not be found to be pretextual.[4]

The Court of Appeals for the Second Circuit reversed, "[b]ecause our review of the record satisfies us that plaintiff has not established that he was discharged because of his age," (App. 3a). The court stated that "the record herein is utterly devoid of any proof of discriminatory motivation on the part of appellants," *id.*

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[3] Ironically, Respondents' counsel had made the very same point in his closing argument to the jury. Noting that the outcome turned on whether Respondents had acted on the basis of age or on the basis of legitimate considerations, and that Outlet's President had testified to the latter, counsel argued:

> Believe him or don't believe him. You saw him. That's up to you. You are the triers of the fact.

[4] Respondents also appealed on a time limits ground that the Court of Appeals did not reach. App. 3a.

at 6a. Additionally, with respect to the filling of the department manager position, the court stated that the reason for bypassing Petitioner proffered by Respondents' witnesses—that they feared morale problems if employees were retained in positions of reduced salary and responsibility—was "not pretextual":

> Assuming that there were lower echelon, poorer paying jobs in the restructured enterprise which buyers were qualified to fill, Outlet would be met with serious morale problems arising out of the substantial reductions in responsibilities and salaries that would accompany such moves. These were matters of concern for Outlet, not pretextual arguments. [*Id.* at 5a-6a.]

## REASONS FOR GRANTING THE WRIT

### Introduction

In this case, a claim of disparate treatment based on age under the Age Discrimination in Employment Act of 1967 (the "ADEA") was submitted to a jury on unchallenged instructions, and the jury returned a verdict for the plaintiff. The court below overturned that verdict and directed entry of judgment for defendants. The court below based that decision on two independent grounds each of which merits review by this Court. First, the court determined that the plaintiff had failed to introduce evidence sufficient to support an inference of disparate treatment on the basis of age, and thus was not entitled to have his claim submitted to a jury, although plaintiff's evidence more than satisfied the requirements for a prima facie case as defined by other Circuits. Second, the court determined that, the defendants having presented in their case live testimony as to a legitimate reason for their failure to continue to employ the plaintiff, and the plaintiff not having introduced evidence specifically rebutting that testimony, the reason given by the defendants for their actions must be taken as true

and "not pretextual"—thereby disposing *as a matter of law* of the critical issue of motivation in the teeth of a jury determination rejecting the credibility of the defendants' testimony.

To understand the significance of these rulings, it is necessary to recall that "[t]he prohibitions of the ADEA were derived *in haec verba* from Title VII [of the Civil Rights Act of 1964]." *Lorillard v. Pons*, 434 U.S. 575, 584. The ADEA prohibits disparate treatment on the basis of age just as Title VII does disparate treatment on the basis of race, sex, religion and national origin. Unlike Title VII, claims under the ADEA are subject to jury trial, *Lorillard, supra*, but the lower courts nonetheless uniformly have concluded—as did the court below in this case—that the methodology for proving claims of disparate treatment under Title VII, enunciated by this Court in a line of cases from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, through *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248,[5] is applicable to such claims under the ADEA.[6]

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[5] See also *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24; *Furnco Construction Co. v. Waters*, 438 U.S. 567; *Teamsters v. United States*, 431 U.S. 324; *Franks v. Bowman Transp. Co.*, 424 U.S. 747.

[6] See, e.g., *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014-19 (1st Cir. 1979); *Geller v. Markham*, 635 F.2d 1027 (2nd Cir. 1980), *cert. denied*, 451 U.S. 945; *Smithers v. Bailar*, 629 F.2d 892 (2rd Cir. 1980); *Smith v. University of North Carolina*, 632 F.2d 316, 334-337 (4th Cir. 1980); *Williams v. General Motors Corp.*, 656 F.2d 120, 127-128 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 1429; *Laugesen v. Anaconda Co.*, 510 F.2d 307, 312 (6th Cir. 1975); *Kephart v. Institute of Gas Technology*, 630 F.2d 1217, (7th Cir. 1980), *cert. denied*, 450 U.S. 959; *Tribble v. Westinghouse Electric Corp.*, 669 F.2d 1193 (8th Cir. 1982), *petition for cert. pending*, No. 81-2202; *Sutton v. Atlantic Richfield Co.*, 646 F.2d 407 (9th Cir. 1981); *Schwager v. Sun Oil Co.*, 591 F.2d 58 (10th Cir. 1979); *Johnson v. Lehman*, 679 F.2d 918 (D.C. Cir. 1982).

As to the first issue decided by the court below, this Court already has before it in *United States Postal Service v. Aikens*, No. 81-1044, certiorari granted March 22, 1982, the question of what is necessary to prove a prima facie case of disparate treatment. The decision of the court below in this case is in direct conflict with the decision on review in *Aikens* (*Aikens v. United States Postal Service*, 665 F.2d 1097 (D.C. Cir. 1981)), where on evidence significantly less compelling than here—particularly, in the absence of evidence that the plaintiff was better qualified than the person selected for the job (evidence that the plaintiff here *did* introduce)—the District of Columbia Circuit found a prima facie case to have been established.

There is a square conflict between the circuits as to the proper resolution of the second issue decided by the court below. The court below has held that, in the context of disparate treatment litigation, the mere introduction of testimony by the defendant of an innocent motivation "negates" as a matter of law any inference of discrimination that might have been created by the evidence introduced in support of the plaintiff's prima facie case—irrespective of whether the fact finder would have credited the defendant's testimony.[7] The Fifth Circuit has ruled similarly,[8] but the Fourth and Eighth Circuits have ruled to the contrary.[9] And the rulings of the court below on this issue, and the similar ruling of the Fifth Circuit, by interposing a rule of law that usurps the fact-finder's prerogative to disbelieve the defendant's

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[7] In addition to the instant case, see *Ste. Marie v. Eastern R. Ass'n*, 650 F.2d 395, 399 (2nd Cir. 1981).

[8] *Reeves v. General Foods Corp.*, 682 F.2d 515, 521-523, n. 11 (5th Cir. 1982).

[9] *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109, 1112 (4th Cir. 1981); *Tribble v. Westinghouse Elec. Corp.*, 669 F. 1193, 1196 (8th Cir. 1982), *petition for cert. pending*, No. 81-2202.

testimony, are inconsistent with principles established by this Court in *Pullman-Standard v. Swint*, —— U.S. ——, 102 S.Ct. 1781.

**Discussion**

1. In *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802, this Court set out a four-factor approach to proving a prima facie case of disparate treatment:

> The complainant in a Title VII trial [may] carry the initial burden under the statute of establishing a prima facie case of racial discrimination * * * * by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Here, as in *Aikens*, the fourth factor of the *McDonnell Douglas* test does not precisely fit because rejection of the plaintiff occurred simultaneously with the selection of other applicants. In *Aikens*, the court of appeals found that a prima facie case was established even though the plaintiff did not prove that he was as qualified or better qualified than the applicants selected to fill the job. Whether the absence of such proof should be fatal to the plaintiff's claim is at issue before this Court in *Aikens*. Unlike *Aikens*, in the instant case the plaintiff proved, in addition to all of the other elements set forth in *McDonnell Douglas*, that he was more qualified than the younger persons selected to fill the jobs he sought.

If this Court were to affirm the court of appeals in *Aikens*, it would follow *a fortiori* that the decision below in the instant case should be reversed. If this court were to reverse in *Aikens*, it may well do so on a rationale that still would require reversal in the instant case.[10] It

[10] The Postal Service in its brief to this Court in *Aikens* contends that the fatal flaw in the plaintiff's case there is the failure

is our submission that on any analysis the plaintiff here introduced more than sufficient evidence to permit a jury to find that it was "more likely than not" that he was the victim of discrimination on the basis of his age.

2. The court below had an alternative basis for concluding that the case should not have gone to the jury on plaintiff's claim of discrimination in the filling of the department manager position: that, as a matter of law, the reason testified to by the employer's officials for preferring the younger, less qualified candidate was "not pretextual." The jury obviously did not credit that testimony, and the decision below thus is the most recent in a line of Second Circuit decisions that hold *as a matter of law* that a plaintiff, even if he has introduced evidence sufficient to establish a prima facie case, cannot prevail absent evidence specifically rebutting the employer's testimony of an innocent explanation.

The rule in the Second Circuit is that when an employer introduces testimony that it was motivated by legitimate reasons those reasons are "presumptively valid," *Geller v. Markham*, 635 F.2d 1027, 1032 (2nd Cir. 1980), *cert. denied*, 451 U.S. 945 (1981), and a plaintiff cannot thereafter prevail merely on the strength of the evidence that established the *prima facie* case. As Judge Friendly put it in *Ste. Marie v. Eastern R. Ass'n.*, 650 F.2d 395, 399 (2nd Cir. 1981), an employer "sufficiently rebuts a prima facie case by pointing to a business reason for his employment decision," and, absent additional and more specific evidence from plaintiff, "negates . . . the force of a plaintiff's initial showing that a qualified minority employee was denied employment or promotion which was given to a majority employee instead." The Fifth Circuit has adopted a similar

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to show "that he was better qualified than the successful applicants." Postal Service Brief at 22. As discussed in text, the plaintiff in the instant case made such a showing.

rule. *Reeves v. General Foods Corp.*, 682 F.2d 515, 521-523 and n. 11 (1982). The rule of decision below on this issue is in direct conflict with decisions of the Fourth and Eighth Circuits (see pp. 15-16, *infra*), and is inconsistent with principles announced by this Court in *Pullman-Standard v. Swint*, —— U.S. ——, 101 S.Ct. 1781.

The flaw in the Second Circuit's rule is that it leaves no room for the possibility that the trier of fact may disbelieve the testimony that constitutes the sole evidence of the employer's supposed "innocent" reason. The plaintiff, by introducing evidence that is sufficient to establish a prima facie case, has shown, if that evidence is credited, that as the record then stands it is "more likely than not" that the decision was based on impermissible factors. Under the usual principles that inform our legal system—in which credibility determinations are made by the trier of fact (judge or jury) that has observed the demeanor of the witnesses—the plaintiff's showing is not "negated" *as a matter of law* because the defendant introduces testimony that points the other way; rather, it is for the trier of fact to determine *as a matter of fact* whether the defendant's testimony is credible. By taking that responsibility from the fact-finder, and holding that as a matter of law the defendant's testimony "negates the force of a plaintiff's initial showing," the Second Circuit has acted inconsistently with the principle stated by this Court in *Pullman-Standard*, 102 S.Ct. at 1790:

> [U]nder § 703(h) [of Title VII], discriminatory intent is a finding of fact to be made by the trial court; it is not a question of law and not a mixed question of law and fact of the kind that in some cases may allow an appellate court to review the facts, to see if they satisfy some legal concept of discriminatory intent.

Nothing in *Burdine* suggests that discriminatory intent is any less a question of fact under § 703(a)—Title VII's counterpart to § 4(a)(1) of the ADEA—

and nothing in *Burdine* is inconsistent with the principle stated in *Pullman-Standard*. The Court in *Burdine* required that an employer's supposed innocent reasons for rejecting the plaintiff be set forth "through the introduction of admissible evidence," 450 U.S. at 255, and added:

> An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden [of production] merely through an answer to the complaint or by argument of counsel. [*Id.* at 255, n.9].

In this manner, the Court assured that the employer's evidence would be exposed to the usual crucible of fact-finding, in which the plaintiff can prevail if the fact-finder concludes "that the employer's proffered explanation is unworthy of credence," *id.* at 256. The defendant's introduction of evidence "raises a genuine issue of fact as to whether it discriminated against the plaintiff," *id.* at 254-255, and "would *allow* the trier of fact . . . to conclude that the employment decision had not been motivated by discriminatory animus," *id.* at 257 (emphasis added).

In contrast to the Second and Fifth Circuits, the Fourth and Eighth Circuits have correctly understood that a jury finding in favor of plaintiff in an ADEA case cannot be reversed on appeal even though the plaintiff's evidence consisted solely of that necessary to establish the prima facie case [11] and even though the defendant called

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[11] In the instant case, Petitioner introduced evidence going beyond the requisites of a prima facie case that also pointed to the pretextual nature of Respondents' "morale" justification. Thus, for example, he showed that contemporaneously Respondents had made inquiries to determine the "relative merits" of all the buyers; that Respondents welched on their promise to give him preferred consideration for other positions that arose; and that Respondents' sole purpose in reorganizing the Malley jobs was to achieve labor savings—a goal with which his ascension to pension eligibility would conflict.

witnesses who testified that the decision was actuated by legitimate considerations. *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109, 1112 (4th Cir. 1981);[12] *Tribble v. Westinghouse Elec. Corp.*, 669 F.2d 1193, 1196 (8th Cir. 1982), *petition for cert. pending*, No. 81-2202.[13]

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[12] See also *Brown v. Eckered Drugs, Inc.*, 663 F.2d 1268, 1272, 1274 (4th Cir. 1981) (same holding under Title VII); but *cf. id.* at 1279-80 (Russell, J., dissenting, urging adoption of Judge Friendly's contrary holding in *Ste. Marie, supra*).

[13] The petition for certiorari in *Tribble* states, as the second question presented:

> In light of the discrimination cases previously decided by this Court, culminating in *Texas Department of Community Affairs v.* Burdine, did the Eighth Circuit err in holding that there was evidence of discrimination where the employer produced evidence of legitimate, nondiscriminatory reasons for its actions, and there was no direct evidence of discrimination and no evidence of pretext?

Petition for Certiorari, No. 81-2202, at p. i. See also, *id.* at 10-11.

## APPENDIX A

## UNITED STATES COURT OF APPEALS
## FOR THE SECOND CIRCUIT

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Cal. Nos. 31, 65—August Term, 1981

(Argued: September 28, 1981

Decided: February 22, 1982)

Docket Nos. 81-7248, 81-7298

---

WALTER PARCINSKI,
*Plaintiff-Cross-Appellant-Appellee,*

—against—

THE OUTLET COMPANY, *et al.*,
*Defendants-Appellants-Cross-Appellees.*

---

Before:

LUMBARD and VAN GRAAFEILAND, *Circuit Judges,*
and BONSAL, *District Judge.**

---

Appeal from a judgment of the United States District Court for the District of Connecticut following a jury trial before Judge T.F. Gilroy Daly and from the denial of defendants' motion for judgment notwithstanding the verdict.

Judgment reversed with instructions to enter judgment for defendants.

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* Of the Southern District of New York, sitting by designation.

VAN GRAAFEILAND, *Circuit Judge*:

The Outlet Company and The Edward Malley Company appeal from a judgment of the United States District Court for the District of Connecticut, Daly, J., which followed a jury verdict in favor of plaintiff Walter Parcinski, and from Judge Daly's order denying defendants' motion for judgment n.o.v. Plaintiff filed what he termed a "cross-appeal" on the ground that Fed. R. Civ. P. 50(b) precluded the district court from considering the merits of defendants' motion for judgment n.o.v. For the reasons discussed below, we hold that the proof did not create a question of fact for the jury, and we reverse with instructions to dismiss the complaint.

Plaintiff was discharged from his employment at The Edward Malley Company of New Haven, Connecticut in June 1977. At the time of his termination, plaintiff was employed as a buyer in housewares, small electrics and the "wooden shop". He was sixty-three years old and had been with Malley for thirty-two years.

Plaintiff's termination occurred after The Outlet Company decided to acquire Malley as the eighth store in its department stores division. Outlet purchased the debt-ridden Malley store for $100 plus assumption of Malley's indebtedness. In the hope that it could convert Malley into a profitable operation, Outlet planned to operate its new acquisition as a branch store, with buying and merchandising handled through Outlet's central purchasing office in Providence, Rhode Island. This new scheme of organization entailed the elimination of Malley's buying and merchandising staff of which plaintiff was a member.

On April 3, 1978, plaintiff engaged an attorney to handle his claim for a pension from Outlet. On May 2, 1978, plaintiff sued Outlet in the United States District Court for the District of Rhode Island, but the case was dismissed for lack of subject matter jurisdiction. On May 7, 1979, after retaining new counsel, plaintiff noti-

fied the United States Department of Labor of his intent to sue under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34. This action was begun on June 21, 1979.

After trial before Judge Daly, the jury returned a verdict for plaintiff in the amount of $93,500, to which the court added $93,500 in liquidated damages pursuant to 29 U.S.C. §§ 626(b) and 216(b). Notwithstanding plaintiff's claim that the defendants had failed to preserve their right to move for judgment n.o.v., Judge Daly considered and denied the motion on the merits.

Defendants present this Court with a two-pronged argument for reversal. In addition to their basic contention that plaintiff's claim of discrimination is without merit, they argue that plaintiff is barred from asserting the claim because his notice of intent to sue was not filed with the Department of Labor within the 300-day limitation period of 29 U.S.C. § 626(d)(2), which is applicable in the State of Connecticut. *Postemski v. Pratt & Whitney Aircraft*, 443 F. Supp. 101, 102-03 (D. Conn. 1977). Plaintiff asserts in response that defendants did not preserve this argument by articulating it in their motion for judgment n.o.v., and that, in any event, it would be inequitable not to toll the running of the limitation period. Defendants advance a number of reasons why both of these arguments should be rejected. Because our review of the record satisfies us that plaintiff has not established that he was discharged because of his age, 29 U.S.C. § 623(a)(1), we see no reason to follow the parties into the procedural thicket created by the foregoing arguments. Instead, we will proceed directly to the merits of plaintiff's claim.

Under the ADEA, an employer may not discharge an employee because of his age, but may discharge an elderly employee for reasonable factors other than age or for good cause. 29 U.S.C. § 623(f)(1, 3). The employee

has the burden of proving that age was a "causative or determinative factor, one that made a difference in deciding whether the plaintiff should be employed." *Geller v. Markham*, 635 F.2d 1027, 1035 (2d Cir. 1980). The employer is not required to prove that there was a justifiable cause for the employee's discharge. *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914, 921 (2d Cir. 1981). So long as the employer gives a legitimate reason for the discharge, the employee has the burden of proving that the discharge resulted, in part at least, from intentional discrimination. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). That burden has not been met in this case.

Since we are required, when reviewing a judgment n.o.v. ruling, to view the evidence most favorably to the party against whom the motion was made, *Samuels v. Health and Hospitals Corp.*, 591 F.2d 195, 198 (2d Cir. 1979), the summary of facts contained in plaintiff-appellee's brief will serve as a good starting point for our discussion. According to plaintiff, Outlet "determined to operate the Malley Company as a branch store" and, "[i]nstead of retaining buyers, Outlet created jobs at lower salaries as department managers." "Outlet did not pursue options other than the mass firings of the Malley buyers, although these options were available." It did not conduct "evaluations of employees", "determine whether Malley employees were more productive than its own employees", "compare absentee rates or efficiency factors nor the comparative costs of Malley buyers against their [sic] own." Outlet "did not follow a policy of attrition", "did not reduce salaries across the board", "change the relationship between salaries and bonuses", "offer outplacement facilities of any kind."

This evidence obviously placed Outlet in a bad light with the jury. However, it did not satisfy plaintiff's burden of proof. The Act does not forbid essential corporate belt-tightening having no discriminatory motivation.

*Stanojev v. Ebasco Services, Inc., supra,* 643 F.2d at 921-22. Indeed, the "mass firings" which took place in this case undermine, rather than support, plaintiff's claim of individual discrimination.

The evidence shows that the decision to eliminate Malley's buying staff was made prior to any consideration of the buyers' ages. Only four out of thirty buyers were assigned to new positions within Malley. Three of these four were within the age range protected by the ADEA. Plaintiff produced no evidence that age was a consideration in the relocation decision. Neither did plaintiff show any practices by defendants that could raise an inference of discriminatory animus.

Malley's precarious financial situation, the economic benefits accruing to branch operations, and the fact that Outlet operated its other department stores as branch outfits all demonstrate that the reorganization was a business decision made on a rational basis. The Age Discrimination in Employment Act does not authorize the courts to judge the wisdom of a corporation's business decisions. *Kephart v. Institute of Gas Technology,* 630 F.2d 1217, 1223 (7th Cir. 1980); *Havelick v. Julius Wile Sons & Co.,* DDE F. Supp. 919, 926 (S.D.N.Y. 1978).

Plaintiff does not, and legitimately cannot, fault Outlet's decision to treat financially troubled Malley as a branch store rather than a separate business entity and to centralize all of Malley's purchasing in Outlet's Providence office. With separate buying thus eliminated, Malley buyers no longer had any duties to perform, and the job of buyer was eliminated, a move motivated solely by economy. Assuming that there were lower echelon, poorer paying jobs in the restructured enterprise which buyers were qualified to fill, Outlet would be met with serious morale problems arising out of the substantial reductions in responsibilities and salaries that would accompany such moves. These were matters of concern for

Outlet, not pretextual arguments. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973).

The ADEA does not require an employer to accord special treatment to employees over forty years of age. *Williams v. General Motors Corp.*, Nos. 79-2857, 80-7192, slip op. at 11240 (5th Cir. Sept. 14, 1981). It requires, instead, that an employee's age be treated in a neutral fashion, neither facilitating nor hindering advancement, demotion, or discharge. *Id.* Since membership in the protected age group is constantly expanding, any rule which mandated preferential treatment for members of the group eventually would limit, and in some cases virtually eliminate, employment opportunities for younger men and women. Because the record herein is utterly devoid of any proof of discriminatory motivation on the part of appellants, the judgment against them is reversed and the matter is remanded to the district court with instructions to dismiss the complaint. *See Stanojev v. Ebasco Services, Inc., supra; Douglas v. Anderson*, No. 78-1121 (9th Cir. Sept. 17, 1981); *Williams v. General Motors Corp., supra.*

Reversed.

## APPENDIX B

## UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

Civil Action File No. N-79-194

WALTER PARCINSKI

vs.

THE OUTLET COMPANY, THE EDWARD MALLEY COMPANY and LEVON F. CHARLSON, President of the Department Stores Division of the Outlet Company

## JUDGMENT

This action came on for trial before the Court and a jury, Honorable T. F. GILROY DALY, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that judgment be and is hereby entered in favor of the plaintiff to recover of the defendants the sum of ONE HUNDREY EIGHTY-SEVEN THOUSAND DOLLARS ($187,000.00) (the jury having awarded the plaintiff the sum of $93,500.00 and the Court having ordered that damages be doubled pursuant to 29 USC § 621 et seq., as amended) and his costs of action.

Dated at New Haven, Connectivut, this 4th day of February, 1981.

SYLVESTER MARKOWSKI
Clerk of Court

## APPENDIX C

## UNITED STATES DISTRICT COURT
## FOR THE DISTRICT OF CONNECTICUT

Civil Action No. N-79-194

WALTER PARCINSKI,
*Plaintiff,*

v.

THE OUTLET COMPANY, ET AL.,
*Defendant.*

## MOTION FOR JUDGMENT N.O.V.

Defenadnts The Outlet Company and The Edward Malley Company ("defenadnts") move this Honorable court to set aside the verdict of the jury and the judgment entered upon the verdict on February 4, 1981, and to grant judgment to defendants notwithstanding the verdict pursuant to F.R. Civ. P. 50 and as grounds therefore state that the verdict of the jury was contrary to legally sufficient evidence and as a matter of law the verdict must be set aside.

Dated: February 10, 1981

March 25, 1981 Motion DENIED for the reasons stated in open court on March 5, 1981 after oral argument.

/s/ T.F. Gilroy Daly
T.F. GILROY DALY
United States District Judge

## APPENDIX D

## SUPREME COURT OF THE UNITED STATES

No. A-14

WALTER PARCINSKI,
*Petitioner,*

v.

OUTLET COMPANY, INC. AND EDWARD MALLEY COMPANY

---

## ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

---

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 17, 1982.

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 9th day of July, 1982.

## APPENDIX E

## SUPREME COURT OF THE UNITED STATES

**No. A-14**

WALTER PARCINSKI,
*Petitioner,*

v.

THE OUTLET COMPANY, INC.,
AND THE EDWARD MALLEY CO.

---

## ORDER FURTHER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIOARI

---

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including September 16, 1982.

/s/ Thurgood Marshall
Associate Justice of the Supreme
Court of the United States

Dated this 12th day of August, 1982.

Office - Supreme Court, U.S.
FILED
NOV 22 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-459

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

WALTER PARCINSKI,

*Petitioner,*

*v.*

THE OUTLET COMPANY
AND
THE EDWARD MALLEY COMPANY,

*Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED

This case involves three questions about the Age Discrimination in Employment Act (the "ADEA"), which have either been fully answered by this Court or are not applicable.

The questions presented are:

I. Have the criteria on the burden of proof, the allocation of such burden and the order of presentation of proof under the ADEA been established by this Court, and were they correctly applied by the Second Circuit, thereby not warranting further consideration?

II. Was there any issue before the Second Circuit regarding the proof required in a *prima facie* case under the ADEA when it was reviewing denial of motion for judgment n.o.v., and if not, does the decision of the Second Circuit conflict with *Aikens v. United States Postal Service*?

III. Was the Second Circuit in conflict with other federal courts of appeal in holding that in a record utterly devoid of any proof of discriminatory motivation or pretext there is no conflict in the evidence sufficient to create a question of fact for submission to the jury?

## TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTIONS PRESENTED... (i)

TABLE OF AUTHORITIES ..... (ii)

OPINIONS BELOW ..... 1

COUNTERSTATEMENT OF THE CASE ..... 2

REASONS FOR DENYING WRIT—The Second Circuit correctly decided the issues and its decision is not in conflict with *Aikens v. United States Postal Service* or with other federal courts of appeal ..... 7

I. The Second Circuit correctly applied the law as to proper allocation of burdens and order of presentation of proof under the Age Discrimination in Employment Act which has been well established and articulated by a line of decisions of this Court and need not be reviewed ..... 10

II. The decision of the Second Circuit is neither similar to nor in conflict with *Aikens v. United States Postal Service* in that *Aikens* deals with the burden of proof required in a *prima facie* Age Discrimination in Employment Act case, while Petitioner's *prima facie* showing is not an issue before this Court ..... 13

III. The decision of the Second Circuit holding that in a record utterly devoid of any proof of discriminatory motivation there is no conflict of evidence which creates a question of fact for determination by the jury is not in conflict with other federal courts of appeal ..... 16

CONCLUSION ..... 22

## TABLE OF AUTHORITIES

*Cases:*

*Ackerman v. Diamond Shammock Corp.*, 670 F.2d 66 (6th Cir. 1982) ..... 17

*Aikens v. United States Postal Service*, 514 F.2d 642, (D.C. Cir. 1980), *cert. granted*, 453 U.S. 902 (1981)

*Cases, continued:* Page

(No. 81-1044), after remand, 665 F.2d 1057 (D.C. Cir. 1981), *cert. granted*, ___ U.S. ___ (1982) (No. 81-1044) ..... 8, 13, 14, 15

*Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1979) ..... 10

*Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (*en banc*) ..... 7, 19

*Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978) ..... 11

*Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981) ..... 11

*Havelick v. Julius Wile & Sons*, 445 F. Supp. 919 (S.D. N.Y. 1978) ..... 9

*Hughes v. Black Hills Power & Light Co.*, 585 F.2d 918 (8th Cir. 1978) ..... 11

*Kephart v. Institute of Gas Technology*, 630 F.2d 1217 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 ..... 9, 11, 17

*Laugesen v. Anaconda Co.*, 510 F.2d 307 (6th Cir. 1975) ..... 11

*Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979) ..... 11, 20

*Lorillard v. Pons*, 434 U.S. 575 ..... 11

*McDonnell Douglas Corp. v. Green*, 411 U.S. 792 ..... 10, 14

*Pullman-Standard v. Swint*, ___ U.S. ___, 102 S. Ct. 1781 (1981) ..... 12

*Reeves v. General Foods Corp.*, 682 F.2d 515 (5th Cir. 1982) ..... 16, 19

*Samuels v. Health and Hospitals Corp.*, 591 F.2d 195 (2d Cir. 1979) ..... 7, 19

*Schwager v. Sun Oil Co.*, 591 F.2d 58 (10th Cir. 1979) ..... 11

*Smith v. Flax*, 618 F.2d 1062 (4th Cir. 1980) ..... 11

*Smith v. Farah Manufacturing Co., Inc.*, 650 F.2d 64 (5th Cir. 1981) ..... 11

**Cases, continued:** Page

*Simmons v. McGuffy Nursing Homes, Inc.*, 619 F.2d 369 (5th Cir. 1980) . . . . . 17

*Smithers v. Bailar*, 629 F.2d 892 (3d Cir. 1980) . . . . . 11

*Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109 (4th Cir. 1981) . . . . . 16, 20

*Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914 (2d Cir. 1981) . . . . . 11

*Sutton v. Atlantic Richfield Co.*, 646 F.2d 407 (9th Cir. 1981) . . . . . 11

*Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 . . . . . 10, 11, 13, 14, 16, 18

*Tribble v. Westinghouse Elec. Corp.*, 669 F.2d 1193 (8th Cir. 1982), *petition for cert. pending*, No. 81-2202 . . . . . 17, 20

**Statutes:**

Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* . . . . . 8

Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e *et seq.* . . . . . 10

**Miscellaneous:**

Fed. R. Civ. P. 52(a) . . . . . 12

5A Moore's Federal Practice ¶ 50.02 . . . . . 21

Respondents' Brief in Opposition to Petition for Certiorari, in *Westinghouse Elec. Corp. v. Tribble*, No. 81-2202 . . . . . 17

Petition for Certiorari, *Aikens v. United States Postal Service*, No. 81-1044 . . . . . 14, 15

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

---

WALTER PARCINSKI,

*Petitioner,*

*v.*

THE OUTLET COMPANY

AND

THE EDWARD MALLEY COMPANY,

*Respondents.*

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

## RESPONDENTS' BRIEF IN OPPOSITION

---

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, reported at 673 F.2d 34, is reprinted in the Appendix to the Petition as Appendix A. The judgment of the United States District Court for the District of Connecticut, entered following the jury

verdict, is unreported, and is reprinted as Appendix B to the Petition. The order of the District Court denying Respondents' Motion for Judgment N.O.V. is unreported, and is reprinted as Appendix C to the Petition.

## COUNTERSTATEMENT OF THE CASE

The facts of this case, although fully and accurately stated in the Second Circuit's decision (Appendix A to Petition), require certain amplification because Petitioner's Brief presents such a distorted interpretation of the evidence and the record.

The Petitioner in his Brief presents a one-sided statement and interpretation of the evidence, omitting the central facts upon which the Court of Appeals based its decision. Without attempting to catalog each of the instances in which such treatment has produced a picture that is out of focus, we respectfully direct this Court's attention to the more salient portions of the evidence, and then to Petitioner's misstatements.[1]

The Edward Malley Company ("Malley"), a Connecticut corporation with a principal asset consisting of a department store in downtown New Haven, Connecticut, had operated in New Haven for approximately 125 years (R. 3), but had fallen on hard times. As of March 31, 1977, about three months before the acquisition, it showed a loss of $4,277 on gross sales of $12,670,755 (T. 336) and was in debt more than $3,120,000. (T. 342) The Outlet Company ("Outlet") had heard through the marketplace, a common source of information, that Malley was having financial difficulties ". . . and might

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[1] In absence of direct evidence of intentional discrimination or pretext, there was no issue at trial which warranted jury determination.

well be on the market and available for purchase." (T. 413) Outlet was interested because it afforded its Department Store Division ". . . a well-known branch under a very excellent retailing name in the Connecticut marketplace." (T. 413)

Outlet, which was following a plan of acquisition or expansion because it wanted to grow, thought that in the acquisition of Malley it could continue the path of growth. (T. 335) Outlet proposed to acquire the stock of Malley for $100 and assume all of Malley's outstanding liabilities. (T. 414) By basically agreeing to pay all of Malley's debts, Outlet made the acquisition. (T. 342) Additionally, Outlet injected $600,000 into Malley after the acquisition. (T. 343) Even with this infusion of cash, Malley still continued to lose money after the acquisition. (T. 343)

At the time of the acquisition, Outlet operated seven stores within its Department Store Dvision, all as branch stores. (T. 235, 412) Mr. Levon F. Charlson, former president of Outlet Department Stores, described how the stores were operated:

> They were operated from a central merchandising base in the Providence store and the other stores were operated as branch operations in that they did not maintain their own buying or merchandising staffs, they're operated in a typical fashion of a branch operation which is understood in the retail business.

(T. 412)

With respect to the acquisition, Mr. Charlson said that upon his learning that Malley's might be available for acquisition (T. 412), he made certain suggestions to Outlet's management about the acquisition. (T. 415) Specifically, he set forth the methods of operation that

would be utilized if Outlet acquired Malley including the elimination of Malley's merchandising staff. (T. 416) The merchandising staff would typically include divisional merchandise managers, buyers, and assistant buyers. (T. 416)

At the time Mr. Charlson made his suggestions neither he nor the rest of Outlet Department Store's management knew the ages of Malley's merchandising staff. (T. 416, 247-248) The plan, organization chart, and *pro forma* budget, with Malley's as a branch store of Outlet Department Stores, was prepared in May, 1977, before any knowledge of the names and ages of the merchandising staff to be eliminated were known. (T. 238, 239, 242) Accordingly, as a result of the acquisition, Outlet eliminated the existing Malley's merchandising staff of thirty employees which included Petitioner.

Outlet could only consummate the acquisition if it turned Malley's into a branch operation and performed the buying function at its central location in Providence. (T. 417) Thus, the decision to eliminate the thirty positions was made by the management of Outlet Department Stores without any consideration given to the ages of the employees who filled the positions. Mr. Randall Dickerson, Vice President of Operations with Outlet Department Stores at the time of the acquisition, said that he did not learn of the ages until well after the method of acquisition had been approved by Outlet. (T. 252) Mr. Charlson was not provided any information about the ages. (T. 419) All of the Respondents' witnesses testified that the only manner in which the acquisition could be accomplished was to make Malley's into a branch store: Mr. Charlson (T. 415-417), Mr. Dickerson (T. 238, 265-266), Felix Oziemblewski (T. 339, 348).

Petitioner and one of his witnesses agreed. Petitioner testified that the reason for the elimination of his position was explained to him by Mr. Charlson. (T. 29, 55) He agreed that as a result of the acquisition ". . . the buying functions for Edward Malley were done away with by Outlet Company." (T. 55) Mr. Alfred Seigle, a former employee of Malley, who held the position of Malley's Merchandise Manager (T. 112), testified that he knew the Malley store was going to become a branch store. (T. 130) Mr. Seigle said that within his experience, a branch store was operated so that the buying function is done at the home office. (T. 130) Petitioner offered no evidence as to some other method by which Malley could have been acquired by Outlet, or that converting it into a branch store was not a reasonable business decision.

Having in mind the proper scope of this appeal and the significance of the evidence,[2] record references are critical. Petitioner has not shown the same circumspection and carefully omits all record references. Petitioner states that "[u]pon acquiring Malley, Outlet restructured certain jobs at the Malley Store with the goal of reducing employment costs". (Petitioner's Brief at 3) The uncontradicted evidence, as previously pointed out, however, is that the decision to eliminate Malley's buying staff was made as a method of acquisition and prior to any consideration of the buyers' ages. (T. 412, 415-416, 247-248, 238-239, 242)

Petitioner's statements of fact also show a careful editing of the testimony and use of the record out of

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[2] Simplistically, the issue on appeal is whether this Court will consider the Second Circuit's review of the record and its conclusion that it is "utterly devoid" of any proof of discriminatory motivation on the part of Respondents.

context.[3] For example, Petitioner states that Mr. Charlson, the then President of Outlet's Department Store division, when asked whether age had been a determining factor in his decision to eliminate the position of buyer responded "Not truly." Omitted was the next question on whether the ages were in any manner taken into consideration in eliminating those [buyer] positions and Mr. Charlson's testimony "Never." (T. 434)

Petitioner's presentation of facts in his Brief is also in conflict with his factual argument before the Second Circuit. He argues now that ". . . a Vice President of Outlet met with Alfred Seigle, the merchandise manager of Malley . . . to secure Seigle's assessment of the 'relative merits' of the Malley buyers". (Petitioner's Brief at 3) In the Reply Brief before the Court of Appeals, Petitioner admitted that in executing this work force reduction, The Outlet Company never conducted evaluation of employees (T. 287, 462).[4]

Petitioner also makes much of an alleged claim to a pension; "termination meant that he would not qualify for a pension despite 32 years' service." (Petitioner's Brief at 4) Petitioner had first engaged an attorney to handle his alleged claim for a pension on April 3, 1978, and thereafter had filed suit in the United States District Court for the District of Rhode Island on May 2, 1978. Although that case was dismissed for lack of subject matter jurisdiction, Petitioner's point about the pension

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[3] Petitioner's statement of the case lacks any references to the record.

[4] This is stated on page three of Petitioner's Reply Brief before the Second Circuit. The transcript references are to the cross examination of Randall Dickerson and Levon Charlson, Respondents' witnesses.

in his Brief is misleading and inappropriate. Attempting to connect Petitioner's termination with any attempt to defeat an alleged pension claim is inapposite to the position taken in the District Court.[5]

In summary, the Second Circuit's opinion demonstrates that it carefully reviewed all of the evidence before making its findings and reaching its conclusions. The Opinion demonstrates that there was ample basis for the Second Circuit's findings and conclusions.

## REASONS FOR DENYING THE WRIT

The Second Circuit correctly decided the issues and its decision is not in conflict with any decisions of this Court, with *Aikens v. United States Postal Service* or with any other federal courts of appeal.

The Second Circuit, in reviewing the denial of Respondents' motion for judgment n.o.v., considered the record in this case in the light most favorable to Petitioner.[6] In arriving at its decision, the Court of

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[5] The issue of Petitioner's entitlement to a pension is still in litigation. His case against Respondents in the Superior Court for the City of New Haven, Connecticut, No. 170261, is pending. In fact, Petitioner proffered no evidence regarding the Malley pension plan other than his opinion that the pension was the factor that made a difference in his termination. (T. 84) The objective evidence, however, was that pensions were determined only by the Malley board of directors on a case-by-case basis, and were paid from profits. (T. 96, 97, 107)

[6] The application of the standard for review of a denial of judgment notwithstanding the verdict by the Second Circuit is not contested by Petitioner and is therefore not an issue before this Court. There is no dispute that the Second Circuit correctly exercised its appellate review function. *See Samuels v. Health and Hospitals Corp.*, 591 F.2d 195, 198 (2d Cir. 1979). *See also Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (*en banc*).

Appeals concluded that Petitioner had failed to meet his ultimate burden of proof at trial to establish age discrimination. The Second Circuit applied the law previously established by this Court regarding the employee's burden of proof in an Age Discrimination in Employment Act ("ADEA") case. There is nothing in the Second Circuit decision to warrant consideration by this Court. The Court of Appeal's decision does not conflict with *Aikens v. United States Postal Service,* 642 F.2d 514 (D.C. Cir. 1980), *cert. granted,* 453 U.S. 902 (1981) (No. 81-1044), after remand, 665 F.2d 1057 (D.C. Cir. 1981), *cert. granted,* ___ U.S. ___ (1982) (No. 81-1044), since there was no issue before the Second Circuit regarding whether Petitioner met his burden of proof in his *prima facie* case. That is the issue on review in *Aikens.* Further, the Second Circuit's decision is not in conflict with any decisions of other federal courts of appeal. The Second Circuit, as well as all other federal courts of appeal, have followed the decisions articulated by this Court. This appeal does not raise any novel questions regarding age discrimination that are of public concern or of such importance to justify review by this Court.

It is apparent from the Court of Appeal's opinion and presentation of the evidence that it carefully reviewed and evaluated the evidence presented in the District Court in concluding that ". . . the record herein is utterly devoid of any proof of discriminatory motivation on the part of (Respondents) appellants." *Parcinski,* 673 F.2d at 39. Thus, for example, the Second Circuit, although finding that Respondents did not create ". . . jobs at lower salaries as department managers," "did not pursue options other than the mass firings of the Malley buyers, although these options were available," did not conduct "evaluations of employees," did not "compare absentee

rates or efficiency factors nor the comparative costs of Malley buyers against their [Outlet] owned," "did not follow a policy of attrition," "did not reduce salaries across the board," did not "change the relationship between salaries and bonuses," and did not "offer out placement facilities of any kind," *Parcinski,* 673 F.2d at 37, concluded that this evidence did not satisfy Petitioner's ultimate burden of proof. The Second Circuit found that although this evidence placed Respondents in a bad light with the jury, "it did not satisfy (Petitioner) plaintiff's burden of proof." *Parcinski,* 673 F.2d at 38.[7]

Lastly, in addition to the Second Circuit's conclusion that there was no direct evidence of discrimination, it also found that the evidence on the decision to eliminate Malley's buying staff was absence of age as a consideration and that Petitioner did not ". . . show any practices by [Respondents] defendants that could raise an inference of discriminatory animus." *Parcinski, supra,* at 38. The decision made by Outlet about not filling lower echelon, poorer paying jobs with Malley buyers because of potentially "serious morale problems" were "matters of concern for Outlet, not pretextual arguments." *Parcinski, supra* at 39.

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[7] The entire focus of Petitioner's case at trial to demonstrate pretext was his attempt to show the imprudence of the method of acquisition of The Outlet Company. Curiously, no evidence was presented by Petitioner as to some other method by which The Edward Malley Company could have been acquired other than converting it into a branch store. The Second Circuit in this regard held that the ADEA did not authorize the courts or juries to judge the wisdom of a corporation's business decision. *Kephart v. Institute of Gas Technology,* 630 F.2d 1217, 1223 (7th Cir. 1980); *Havelick v. Julius Wile Sons & Co.,* 445 F. Supp. 919, 926 (S.D. N.Y. 1978). Petitioner has continued to conceal his response to that legal proposition.

I.

**THE CRITERIA ON THE BURDEN OF PROOF REQUIREMENTS, THE PROPER ALLOCATION OF BURDENS AND THE ORDER OF PRESENTATION OF PROOF UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT, HAVE BEEN PREVIOUSLY ESTABLISHED BY A LINE OF DECISIONS OF THIS COURT, WERE CORRECTLY APPLIED BY THE SECOND CIRCUIT, AND NEED NOT BE REVIEWED.**

Petitioner is incorrect in stating that the Second Circuit partially premised its decision on a finding that Petitioner did not satisfy the requirements for a *prima facie* case as defined by this Court. The Second Circuit made no such finding. Rather, the Second Circuit looked to all of the evidence as a whole and found that Petitioner had not satisfied his burden of proof as previously described and articulated by this Court. All of the evidence pointed one way and was not susceptible of any reasonable inference sustaining Petitioner's position. Thus, there is no question before this Court as to what burdens are placed on Petitioner and Respondents in a cause of action brought under the ADEA.

This Court has thoroughly considered the issues regarding the allocation of burdens and the order of proof in the context of discrimination cases brought under Title VII of the Civil Rights Act of 1964. Those burdens were well-described by this Court when the principles were established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

The principles established in *McDonnell Douglas* have been elaborated upon in subsequent decisions by this Court. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1979);

*Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978). That law has consistently applied these principles to age discrimination cases by virtually all of the courts of appeals, including the Second Circuit.[8] Moreover, in *Lorillard v. Pons*, 343 U.S. 575 (1978), the Court noted that "the [substantive] prohibitions of the ADEA were derived in *haec verba* from Title VII." *Lorillard* at 584. The guidelines have been so clearly laid down by this Court that there is no need for this Court to reiterate them in any case, much less intervene in this case. The conscientious efforts of the Second Circuit applying the burden of proof requirements as established by this Court further justify the lack of need for review here.

In short, the Court of Appeals held that Petitioner did not satisfy his burden of proof under *Burdine*. Respondents were not required to prove that there was a justifiable cause for the employee's discharge, *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914 (2d Cir. 1981), but Petitioner had the burden of proving that age was a "causative or determinative factor, one that made a difference in deciding whether the plaintiff should be employed." *Geller v. Markham*, 635 F.2d 1027, 1035 (2d Cir. 1980). In attempting to foist a new rule and limitation upon all federal courts of appeal, Petitioner

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[8] *See Smith v. Farah Manufacturing Co., Inc.*, 650 F.2d 64, 67 (5th Cir. 1981); *Sutton v. Atlantic Richfield Co.*, 646 F.2d 407, 411 (9th Cir. 1981); *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914, 919-920 (2d Cir. 1981); *Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1222 (7th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981); *Smithers v. Bailar*, 629 F.2d 892, 894 (3d Cir. 1980); *Smith v. Flax*, 618 F.2d 1062, 1066 (4th Cir. 1980); *Loeb v. Textron*, 600 F.2d 1003, 1010 (1st Cir. 1979); *Schwager v. Sun Oil Co.*, 591 F.2d 58, 60 (10th Cir. 1979); *Hughes v. Black Hills Power & Light Co.*, 585 F.2d 918, 919 (8th Cir. 1978); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 311-312 (6th Cir. 1975).

disparages this law in suggesting that its mandates are insufficient in guiding a court of appeals in reviewing the evidence in an ADEA case. Of course, it is not a question of "guiding" a court of appeals. Such a court in review of a district court record has substantial latitude in arriving at its findings and conclusions.[9]

Thus, we must take issue with Petitioner's approach to the problem. Petitioner attempts to fragment the evidence in an effort to say that the Second Circuit addressed the issue of the *prima facie* case. The evidence cannot be fragmented because the Second Circuit's decision does not address Petitioner's *prima facie* case. The Second Circuit must, and in fact did, look to all of the evidence because the issue before it was the District Court's denial of Respondents' motion for judgment n.o.v. Petitioner seeks to persuade this Court to substitute its judgment for the Second Circuit. The Second Circuit carefully reviewed all aspects of the

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[9] We are not confronted with the issue of the obligation of a court of appeals to accept a district court's finding of fact unless clearly erroneous, or with distinctions between questions of fact and questions of law. In those instances in Title VII case, *see Pullman-Standard v. Swint*, 102 S. Ct. 1781 (1982). Petitioner makes a subsidiary argument that the Second Circuit's decision conflicts with the principles announced by this Court in *Pullman-Standard v. Swint*, U.S., 101 S. Ct. 1781 (1982). This is not the case. *Pullman-Standard* concerned whether a court of appeals was bound by the "clearly erroneous" role of Fed. R. Civ. P. 52(a) in reviewing a District Court's findings of fact in a non-jury Title VII case. The Second Circuit, in stark contrast, was not addressing any finding of fact. Rather, it was asked to review all of the evidence as to its sufficiency for warranting jury determination. While *Pullman-Standard* questioned the court of appeals' review of the trial judge's finding of fact in a Title VII case, the Second Circuit addressed whether this particular ADEA case should have been submitted to the jury.

evidence. Its decision reflects this careful consideration. The evidence and its application of the law amply supports it.

II.

**THERE WAS NO ISSUE BEFORE THE SECOND CIRCUIT REGARDING WHAT IS NECESSARY TO PROVE A *PRIMA FACIE* CASE OF AGE DISCRIMINATION WHEN IT WAS REVIEWING THE DENIAL OF A MOTION FOR JUDGMENT N.O.V.; THEREFORE, THE DECISION DOES NOT CONFLICT WITH *AIKENS v. UNITED STATES POSTAL SERVICE.***

In what can only be considered a half-hearted effort, Petitioner attempts to characterize ". . . the first issue decided by the Court below" (Brief at 11), as the same with which the Court already has before it in *United States Postal Service v. Aikens,* No. 81-1044.[10] Petitioner's point creates a straw man. The Second Circuit never suggested anything with regard to Petitioner's *prima facie* case, which was the only focus of the District of Columbia Circuit Court of Appeals and this Court's attention in *Aikens.*[11] The fallacy of Petitioner's position is that there is no conflict between the fundamental principles applied by the Second Circuit and the stated reason for granting certiorari in *Aikens.*

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[10] Certiorari was granted in *Aikens* on March 22, 1982. The decision on review is *Aikens v. United States Postal Service,* 665 F.2d 1097 (D.C. Cir. 1981).

[11] The broad issue in *Aikens* is whether the four prerequisites of a *prima facie* case of discrimination have been tightened in light of *Texas Dept. of Community Affairs v. Burdine.* At the very least, the original petition for writ of certiorari was granted ". . . for further consideration in light of *Texas Department of Community Affairs v. Burdine* . . .," 453 U.S. 902.

In the original D.C. Circuit Court of Appeals divided decision,[12] *Aikens v. United States Postal Service, et al.*, 642 F.2d 514 (D.C. Cir. 1980), the sole issue for review on appeal was the correctness of the district court's grant of summary judgment for the Postal Service based on Aikens' failure to make out a *prima facie* case of racial discrimination under Title VII. The court of appeals reversed, holding that under *McDonnell Douglas Corp.*, a Title VII plaintiff need now show, as part of a *prima facie* case of promotion discrimination, that he was as qualified or more qualified than the person actually selected for promotion. The Court of Appeals remanded the case. Thereafter, the Postal Service filed a petition for a writ of certiorari, which was granted. This Court vacated the judgment and remanded to the court of appeals for reconsideration in light of *Texas Department of Community Affairs v. Burdine*.[13]

On remand, the court of appeals reaffirmed its previous holding that the district court had erred in requiring Aidens to show that his qualifications were equal to or better than those of the individuals actually selected for promotion. The court of appeals said that this Court had never held that establishment of a *prima facie* case must include proof that the plaintiff was "as qualified or more qualified" than the persons hired or promoted. Such a

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[12] The decision of the Second Circuit was unanimous.

[13] The Postal Service's petition had argued that in the *promotion context*, the court of appeals holding had not taken into account that oftentimes many applicants may be minimally qualified for a single vacancy, making any presumptions of minimum qualification illogical. The case before the Second Circuit was not a failure to promote case.

requirement was held not to be applicable to a *prima facie* case, 665 F.2d at 1059.[14]

In essence, the court of appeals in *Aikens* reaffirmed its earlier holding that an individual complaining of promotional discrimination in violation of Title VII can establish a *prima facie* case merely by showing the four stages of *McDonnell Douglas* without proving he was as qualified as the person promoted. That holding, viewed under *Burdine* in the promotional context, is the controlling issue before this Court on certiorari. The *Aikens* issue involves only whether a Title VII plaintiff, in order to establish a *prima facie* case of promotional discrimination, must show that he was qualified for the sought-after position or, as the district court held, that he was as qualified as or more qualified than the person selected by the employer.

We respectfully suggest that the *Aikens* issue and the context in which it arose was not before the Second Circuit and is not an issue in this case. Here, the sole issue is whether a jury question was created by Petitioner in the absence of any evidence of intentional discrimination or pretext. The Second Circuit's decision, unlike the *Aikens* case, does not address whether Petitioner made out a *prima facie* case. In fact, the Second Circuit analysis assumes a *prima facie* case.[15] The Second Circuit was reviewing the evidence on a ruling denying motion for judgment n.o.v. In reviewing the record, the Second

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[14] The Postal Service argues in its Brief that in light of *Texas Department of Community Affairs v. Burdine*, the elements identified by the court of appeals are insufficient *in the context* to show that plaintiff was rejected under circumstances which give rise to an inference of unlawful discrimination.

[15] The Second Circuit makes no mention of the term "*prima facie*" in its Opinion.

Circuit was only concerned with the application of the principles enumerated in *Burdine* beyond the *prima facie* case as they applied to Petitioner's burden of persuading the trier of fact that age was a determining factor in his discharge. *Burdine* at 253.

Putting aside Petitioner's descriptive epithet (the Second Circuit decision is in "direct conflict" with *Aikens*), there is virtually no attempt to compare the Second Circuit's decision to that on appeal in *Aikens*. We respectfully submit that there is no comparison which can be made between the two cases.

III.

**THE SECOND CIRCUIT'S HOLDING THAT IN A RECORD UTTERLY DEVOID OF ANY PROOF OF DISCRIMINATORY MOTIVATION OR PRETEXT THERE IS NO CONFLICT OF EVIDENCE SUFFICIENT TO CREATE A QUESTION OF FACT FOR SUBMISSION TO THE JURY IS NOT IN CONFLICT WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEAL.**

Petitioner claims that the Second Circuit's opinion is in conflict with decisions from other circuits. An analysis of these cases supports a contrary conclusion.

Petitioner erroneously implies that the Second Circuit ruled as a matter of law that a plaintiff, even if he has introduced evidence sufficient to establish a *prima facie* case, cannot prevail unless he produces evidence specifically refuting the employer's explanation for the termination. Petitioner states that the Fifth Circuit has adopted a "similar" rule in *Reeves v. General Foods Corp.*, 662 F.2d 515 (1982), and argues that the Second and Fifth Circuits are in direct conflict with decisions of the Fourth and Eighth Circuits in *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109 (4th Cir. 1981), and

*Tribble v. Westinghouse Elec. Corp.*, 669 F.2d 1193 (8th Cir. 1982), *petition for cert. pending*, No. 81-2202. Once again, what Petitioner leaves unsaid about these four decisions is most significant.

Petitioner's Brief does not address the following legal propositions asserted in each of the decisions which are left intact:[16] first, that in the absence of direct evidence of intentional discrimination or any evidence of pretext, when the employer articulates his legitimate business reason, there is no conflict of evidence sufficient to create a question of fact for the jury. Second, this is a correct application of the law under *Burdine*. Third, that this application is consistent with the law as applied by all courts of appeal. Also significant is the fact that while Petitioner devotes much space to demonstrating the "flaw" in the Second Circuit's rule, he nowhere specifically compares the holdings in the four cited decisions as demonstrating the conflict. (See Brief at 14 and 15.) We respectfully invite the Court's attention to a proper analysis of these four cases, beginning with what the Second Circuit actually held.

The Second Circuit did not state the rule as articulated by Petitioner. The Second Circuit found that Petitioner did not meet his burden of proof in the case. In so

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[16] The brief in opposition to the petition for certiorari in *Tribble* further points to the Fifth, Seventh, and Sixth Circuits as being in agreement on the law, but differing on a case-to-case basis on the question of quantitative evidence. *See Simmons v. McGuffy Nursing Homes, Inc.*, 619 F.2d 369 (5th Cir. 1980), *Kephart v. Institute of Gas Technology*, 630 F.2d 1217 (7th Cir. 1980), and *Ackerman v. Diamond Shammock Corp.*, 670 F.2d 66 (6th Cir. 1982). In these three decisions, the Court found insufficient evidence to warrant submission of a genuine issue of material fact to the trier of fact.

holding, the Second Circuit ruled that Petitioner had failed to introduce either direct evidence of discrimination or any evidence of pretext. Citing *Burdine*, the Second Circuit correctly stated the rule that ". . . the employee has the burden of proving that the discharge resulted, in part at least, from intentional discrimination . . . that burden has not been met in this case." *Parcinski*, 673 F.2d at 37. In essence, there was no direct evidence of discrimination. As to evidence of pretext, the Court of Appeals after viewing the evidence in a light most favorable to Petitioner,[17] found that it did not constitute evidence of pretext. The Second Circuit concluded in this regard that although such evidence "obviously placed Outlet in a bad light with the jury", it did not satisfy plaintiff's burden of proof. All the Second Circuit did was apply the *Burdine* principles in concluding that after the employer articulates the legitimate nondiscriminatory reason for the discharge, the inference of discrimination which has been created by employee's *prima facie* case is destroyed. Employee then has the ultimate burden of proof to provide either evidence of pretext or evidence of direct discrimination (which might have been provided in the *prima facie* case as well). Another way to state the application of the *Burdine* rule is that by presenting evidence of direct discrimination or pretext, the employee has satisfied his burden of creating an issue of fact as to the employer's

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[17] The Second Circuit's review of the evidence gave more than a benefit of the doubt to Petitioner. The use of the summary of facts contained in plaintiff-appellee's brief was more than viewing the evidence favorably to the Petitioner. In fact, a good part of that evidence was never introduced but consisted merely of the content of questions posited by Petitioner's counsel to Respondents' witnesses.

legitimate nondiscriminatory business reason. Such an issue did not exist in the District Court, said the Second Circuit.

*Reeves* is consistent with the Second Circuit's application of the law, but again does not stand for the proposition as stated by Petitioner. The sole issue on appeal in *Reeves* was whether there was substantial evidence of intentional, age-based discrimination to support the jury's verdict. The Fifth Circuit, after discussing the standards of review for analyzing the sufficiency of the evidence,[18] concluded that there was substantial evidence of intent to discriminate on the part of General Foods, on which the jury's verdict could be sustained.

The agreement between the Second and Fifth Circuits is patent: if there is sufficient evidence of intentional discrimination or pretext, the discrimination case warrants submission to the jury for the determination of those factual issues. In *Reeves* there was sufficient evidence of intentional discrimination. In the Second Circuit decision, there was not sufficient evidence of either intentional discrimination or pretext to warrant submission of the case to the jury.

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[18] Petitioner does not contend that the Second Circuit abused its standard for review of a denial of the judgment n.o.v. Under that standard as uniformly applied, if the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict, granting the motion is proper. On the other hand, if there is substantial evidence, that is, evidence of such quality of weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. *Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (*en banc*); *Samuels v. Health & Hospitals Corp.*, 591 F.2d 195 (2d Cir. 1979).

Petitioner makes a one sentence stab at suggesting that the rule in the Fourth and Eighth Circuits is different than in the Second and Fifth Circuits: an ADEA case cannot be reversed on appeal even though plaintiff's evidence consists solely of that necessary to establish the *prima facie* case. (Petitioner's Brief at 15.) The asserted contradiction between the circuits further assumes that the employer called witnesses to testify that the decision was premised on legitimate considerations. (Petitioner's Brief at 18.) Petitioner not only misstates the holdings of the two cases from the Fourth and Eighth Circuits, but overstates the "rule" as well.

In *Spagnuolo*, the Fourth Circuit upheld the district court's findings that there was direct evidence of the purpose and conduct of Whirlpool in demonstrating discrimination against the employee, which the jury found persuasive. The reliance on direct evidence instead of inference obviated any need for an independent showing that Whirlpool's justifications were "pretextual." *See Loeb v. Textron, Inc.*, 600 F.2d 1003, 1017-18 (1st Cir. 1979). In so ruling, the Fourth Circuit was consistent with the Second and Fifth Circuits. As the Fourth Circuit stated, the plaintiff did not rely on statistical data or any other kind of inferential proof of discriminatory motive. Because of plaintiff's *direct evidence*, a question of fact was created as to Whirlpool's articulated legitimate business reason.

*Tribble* is presented as a case consistent with the "different" Fourth Circuit rule. Quite the contrary, *Tribble* is purposely consistent with the other three Circuits. The issue on appeal was Westinghouse's contention that the district court had erred when it failed to grant Westinghouse's motion for directed verdict because plaintiff had not come forward with any evidence that

the reasons given by Westinghouse were pretextual. The Eighth Circuit was satisfied that plaintiff's *prima facie* evidence contained sufficient evidence to establish the possible pretext of Westinghouse's offered evidence of a legitimate non-discriminatory reason for discharging plaintiff. No new or different rule of law was cited. All that happened was that the Eighth Circuit, in fulfilling its standard of review, found evidence of pretext. This created an issue of fact warranting the denial of directed verdict for Westinghouse.

These four cases do not represent a conflict among the federal courts of appeals; they represent differences in the quantity and quality of a plaintiff-employee's evidence in each particular case. What Petitioner seeks is a rule requiring the submission of an ADEA case to a jury regardless of how conspicuously silent evidence of discrimination or pretext may be. The point being urged is the application of a non-flexible rule. Such a rule would require every ADEA case to be submitted to a jury thereby negating any role a trial judge should play in considering whether the evidence warrants jury determination.[19]

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[19] For role of trial judge on motions for directed verdict, see 5A Moore's Federal Practice ¶ 50.02.

## CONCLUSION[20]

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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[20] Pursuant to Sup. Ct. R. 28.1, Respondent Outlet Company has no parent company and its only subsidiary not wholly owned is KOVR TV, Inc. The Edward Malley Company's parent is United Department Stores, Inc.

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No. 82-459

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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WALTER PARCINSKI,
*Petitioner,*

v.

THE OUTLET COMPLANY, INC., and
THE EDWARD MALLEY COMPANY,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## REPLY BRIEF IN SUPPORT OF PETITION

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## TABLE OF CASES


| | Page |
|---|---|
| Aikens v. United States Postal Service, 665 F.2d 1097 (D.C. Cir. 1981), *pending on writ of certiorari*, No. 81-1044 | 4, 5 |
| Pullman-Standard v. Swint, —— U.S. ——, 101 S.Ct. 1781 | 6 |
| Stanojev v. Ebasco Services, Inc., 643 F.2d 914 (2d Cir. 1981) | 5, 6 |
| Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 | 5, 6 |
| Tribble v. Westinghouse Elec. Corp., 619 F.2d 1193 (8th Cir. 1982), *pending on petition for certiorari*, No. 81-2202 | 7 |
| Williams v. General Motors Corp., 656 F.2d 120 (5th Cir. 1981) | 6 |

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## REPLY BRIEF IN SUPPORT OF PETITION

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Despite the hyperbole with which Respondents introduce their Counterstatement (Br. Opp. 2), and their complaint that we did not include transcript references in our Statement (*id.* 5),[1] Respondents do not take issue with any of the specific evidentiary recitals in our State-

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[1] In light of Respondents' hyperbole, we have lodged a copy of the trial transcript with the Clerk. Our statement respecting the filling of the department manager position in New Haven (Pet. 3-5, 6) is based upon Tr. 9-10, 18-19, 28-31, 33, 114-122, 126-129, 276, 307-310, 411-412, 421-422, 426-427, 456-457; see also nn.2,3 *infra*. Our statement respecting the filling of the housewares buyer position in Providence (Pet. 5, 6-7) is based upon Tr. 32-33, 35-37, 263-265, 267-269, 296, 310, 426-427, 430-431, 434-435, 464-466.

ment (Pet. 2-7).[2] Indeed, Respondents' Counterstatement does not discuss at all the two events that give rise to the

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[2] In three minor respects, Respondents quibble with our characterization of an item of evidence, in each instance without justification:

a. Respondents point out that after initially responding "Not truly" to the question whether age had been a factor, Outlet's President was asked the question again by Respondents' counsel and responded "Never." (Br. Opp. 6). Our statement recited that the witness "responded *initially*: 'Not truly' " (Pet. 6, emphasis added). It was, of course, for the jury to evaluate whether the witness' second response dissipated the implication flowing from his first, and, given that the jury returned a verdict for Petitioner, "the evidence must be viewed in the light most favorable to Petitioner, and our statement proceeds accordingly" (Pet. 2).

b. Respondents elliptically challenge (Br. Opp. 6) our statement in the petition that "Prior to deciding which employees to keep as department managers, a Vice President of Outlet met with Alfred Seigle, the merchandise manager of Malley . . . to secure Seigle's assessment of the 'relative merits' of the Malley buyers" (Pet. 3). Seigle's testimony was as follows:

> Q. Now, before June 24th when all these buyers were fired did you meet with the people from the Outlet to discuss the transition into their ownership?
>
> A. Well, I was called in one day by Mr. Steinhardt, not to discuss the transition, but to discuss the relative merits of the —some of the buyers.
>
> * * * *
>
> Q. At whose request?
>
> A. He called me.
>
> Q. What were you asked at the meeting?
>
> A. Well, he asked basically what I thought about the relative strength of a lot of our buyers. He asked me to identify those people that I thought were the strongest ones that we had. [Tr. 126-127].

Parcinski was one of the five "strongest buyers" identified by Seigle at that meeting (Tr. 128), and Seigle recommended that "even if the buying was going to be done in Providence" those five "should be retained here . . . in some capacity" (Tr. 129). The buyer actually selected in preference to Petitioner as housewares department manager was not among the five recommended by Seigle (Tr. 120, 128), and Petitioner was "extensively experienced" for that job while

discrimination claims—and hence the legal questions—at issue here: The selection of a younger, less qualified employee over Petitioner for manager of the housewares department in New Haven, and the bypassing of Petitioner in favor of a younger, less qualified employee when the buyer position in Providence became vacant. Instead, Respondents present a lengthy recitation of evidence to make a point not in issue here: that their decision to eliminate the buyer positions in New Haven and to consolidate all buying in Providence was not motivated by age.[3]

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the person selected had "minimum experience" (Tr. 122). In every aspect of the job, Petitioner was "the better" (Tr. 122). [The testimonial references cited by Respondents at Br. Opp. 6, as well as the discussion in Petitioner's Reply Brief to the court below cited at Br. Opp. 6 n.4, involve a different matter: whether Respondents ever compared the relative merits of Outlet's buyers in Providence with those of Malley].

c. Respondents hint that a desire to deprive Petitioner of a pension could not have been their motivation, as there was no certainty that Petitioner would have received a pension even had he been allowed to continue working until age 65 (Br. Opp. 6-7 and n.5). The former President of Malley testified that in Malley's history no employee had ever satisfied Malley's traditional age and service requirements (age 65 with 25 years service, Tr. 96) without being awarded a pension (Tr. 97-98), and that in 1973 he had persuaded Petitioner to turn down a higher paying job with a rival company by noting that if Petitioner remained with Malley until age 65 he would receive a pension (Tr. 99-100). One of Outlet's Vice Presidents testified that following the acquisition those Malley employees who were retained were brought under Outlet's pension plan and credited thereunder with their years of service with Malley (Tr. 358). The jury thus had evidence before it that Petitioner *would have* received a pension had he been kept on by Outlet.

[3] It is indisputed in the record that Outlet knew the exact ages of all the Malley buyers at the time that Petitioner was terminated and a younger, less qualified Malley buyer kept on as manager of the housewares department (Tr. 251-252).

I.

The first issue presented in our petition relates to the kind of evidence necessary to establish a prima facie case of discrimination. It is our contention that the Second Circuit held here that Petitioner failed to establish a prima facie case, and that that holding is in conflict with the D.C. Circuit's holding in *Aikens* v. *United States Postal Service*, 665 F.2d 1097 (D.C. Cir. 1981), *pending on writ of certiorari*, No. 81-1044. Indeed, because Petitioner's evidence here was so much stronger than that in *Aikens* we have suggested that this Court's decision in *Aikens* may establish the error of the Second Circuit in *this* case even if the District of Columbia Circuit's holding in *Aikens* is reversed. (Pet. 11-13).

Respondents dispute that this issue is presented by the decision below. According to Respondents, "the Second Circuit looked to all of the evidence as a whole and found that Petitioner had not satisfied his burden of proof...." (Br. Opp. 10). It is true that in deciding a motion for judgment notwithstanding the verdict—as contrasted with a Rule 41(b) motion at the close of the plaintiff's case—it is appropriate for a court to rule on the basis of the totality of the record and not solely on the basis of evidence presented in the plaintiff's opening case (the latter, of course, being the evidence that comprises the plaintiff's "prima facie" case). But the same legal standard controls the resolution of both motions: whether on the evidence considered in the light most favorable to the party against whom the verdict is sought there is no basis upon which a reasonable person could rule for that party. And, in most cases, as here, in practical effect, the question presented by a motion for judgment n.o.v. made by the defendant is either the same as the question whether the plaintiff has made out a prima facie case or one that *a fortiori* should be answered in plaintiff's favor if a prima facie case is determined to exist.

That is so precisely because the evidence must be considered in the light most favorable to the plaintiff. If the

plaintiff's prima facie case contained evidence from which a reasonable person could find that defendant acted with discriminatory intent, that evidence would still be in the record at the time of a motion for judgment n.o.v. Testimony in the defendant's case may supplement the evidence from which discriminatory intent may be found. But, except in the rare case where the defendant has introduced evidence which the jury is not at liberty to disbelieve,[4] evidence in the defendant's case does not as a matter of law defeat or terminate the inferences from the plaintiff's case but merely provides a basis that would "*allow*" the jury to reach a different conclusion. *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 257 (emphasis added). See Pet. 14-15. Certainly, in the present case, defendant presented no evidence in its case that was not subject to disbelief by the jury. Pet. 14-15. Therefore, if plaintiff had presented a sufficient "prima facie" case, the motion for judgment n.o.v. should have been denied. When the court below declared that it was reversing the jury's verdict "[b]ecause the record herein is utterly devoid of any proof of discriminatory motivation on the part of appellants" (Pet. 6a), it was necessarily holding that Petitioner had failed to establish a prima facie case. It is accordingly correct to characterize the decision below as in conflict with the decision in *Aikens*.

Indeed, the court below apparently understood that its decision was equivalent to a ruling that Petitioner had not made out a prima facie case. Two of the decisions the court cited as supporting its ruling that "the record herein is utterly devoid of any proof of discriminatory motivation on the part of appellants" (Pet. 6a) are cases in which the sole holding was that the plaintiff had failed to establish a prima facie case (*ibid.*, citing *Stanojev* v. *Ebasco Services, Inc.*, 643 F.2d 914 (2d Cir. 1981);

[4] An example would be a contemporaneous document, the authenticity of which is conceded, that irrefutably rebuts the plaintiff's testimony as to the existence of an element of his prima facie case.

*Williams* v. *General Motors Corp.*, 656 F.2d 120 (5th Cir. 1981)).[5]

## II.

Respondents agree that our second question presented *is* presented by the decision below. In Respondents' words (Br. Opp. 18):

> All the Second Circuit did was . . . conclud[e] that after the employer *articulates* the legitimate nondiscriminatory reason for the discharge, the *inference* of discrimination which has been created by employee's *prima facie* case is *destroyed.* [Emphasis added].

That is our understanding of the Second Circuit's holding as well (Pet. 11, 13), and for reasons explained in the petition we believe it to be an erroneous statement of the law and contrary to this Court's decisions in *Burdine* and *Pullman-Standard* v. *Swint*, —— U.S. ——, 101 S. Ct. 1781 (Pet. 14-15).

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[5] In *Stanojev*, the court's sole holding was:

> Since Stanojev was not replaced after he was fired, he was not able to establish a prima facie case by the "set of circumstances" derived from *McDonell Douglas.* Nor did Stanojev establish a prima facie case by any other method." [643 F.2d at 924].

In *Williams*, the court began its opinion as follows:

> Our conclusion, in brief, is that plaintiffs have failed to establish a prima facie case of age discrimination, and we accordingly affirm certain orders of the district court and reverse others, as detailed *infra.* [656 F.2d at 121].

Respondents apparently forget that their brief to the Second Circuit itself raised the question whether plaintiffs had established a prima facie case:

> [T]he Employer contends that the Employee never even established a prima facie case of age discrimination . . . [I]t is clear that the Employee failed even to meet that initial burden. [Cross-Appeal Brief on Behalf of Defendants-Cross-Appellees in *Parcinski* v. *The Outlet Co.*, Nos. 81-7248, 81-7298 (2d Cir.) at 37-38. See also, *id.* at 35-36].

Respondents defend the Second Circuit's holding on the ground that once a non-discriminatory reason is "articulated" by the employer, the plaintiff must lose unless he introduces (or has already introduced) "direct" evidence of discriminatory motive or explicit evidence that the articulated reason was a pretext (Br. Opp. 18-19). That is precisely the rule that is sought by the *petitioner* in another case pending before this Court on petition for certiorari, *Westinghouse Elec. Corp.* v. *Tribble*, No. 81-2202.[5] As the existence of that petition suggests, the holding below on this issue is in direct conflict with that of the Eighth Circuit in *Tribble*, 619 F.2d 1193, 1196 (8th Cir. 1982). And, contrary to Respondent's effort to distinguish *Tribble* (Br. Opp. 20-21), a reading of the Eighth Circuit's opinion makes clear that a jury verdict for plaintiff was upheld in *Tribble* in the face of an employer's "articulated" nondiscriminatory reason on the strength of a prima facie case that was far less substantial than that established by Petitioner here, 669 F.2d at 1196.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[5] At Pet. 16, n.13, we quote the pertinent question presented in *Tribble*.